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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1963.

No. 415

HARRY IRWIN, et al.,
Petitioners,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
a Corporation,
Respondent.

BRIEF

In Opposition to Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with petitioners' questions, because, for the reasons set out in argument, I, *infra*, p. 3, the questions postulate a jurisdictional fact not appearing of record.

STATEMENT OF CASE

Petitioners' statement of the case is in error. It includes a statement of jurisdictional fact not appearing of record. See argument, I, *infra*, p. 3.

SUMMARY OF ARGUMENT

I. Petitioners' Questions Presented for Review do not exist on the record here; for they include the jurisdictional assertion that respondent was "in an industry affecting commerce" which is neither pleaded, proved nor admitted.

II. The Missouri Court did not decide a federal question.

III. The Missouri decision was founded upon adequate independent dispositive non-federal grounds.

IV. Petitioners are estopped from alleging error in the decision of this case under standards of local contract law, rather than of federal law; because petitioners presented their case, both at trial and on appeal, on this very theory.

ARGUMENT

I

Petitioners' "Questions Presented for Review" (Pet'n p. 3) are not presented by their record. They therefore do not comply with Rules 15.1 (e) (1) and 40.1 (d) (1) of this Court, which require questions presented for review to be "expressed *in the terms and circumstances of the case*".

Question 1 postulates (p. 3) that "respondent employer" was "in an industry affecting commerce".

Question 2 incorporates this postulate by reference (p. 4).

Petitioners' Statement of Material Facts (Pet'n p. 6) contains the following assertion:

> "Respondent here (defendant) is a newspaper publishing company *engaged in an industry affecting commerce as defined in the Labor Management Relations Act of 1947*, 29 U. S. Code, Secs. 142, 152."

Rule 40.1 (e) of this court requires that statements of fact of this sort be supported by reference to the record. No record reference is given. The lack of record support is obscured by placing the statement amidst a recital of agreed-to facts. It is preceded by a sentence beginning: "It was stipulated * * *". It is followed by a paragraph beginning: "It was *further* admitted * * *" (Pet'n. p. 6) (*What is the antecedent to which the author meant that this court should apply the word "further"?*).

The fact is, not only that there was no such stipulation nor admission, but also that there was no such evidence. More important, in the present posture of the case, there

was never any occasion for either such admission or evidence: *There is not, and there never was, any allegation in petitioners' Missouri pleadings, suggestions, briefs or motions of any such fact* (R. pp. 2-7; R. pp. 1-521; Pet. 1-36 a).

On the contrary, the correlative allegation of the petitioners' petition, on which the right to recover is even now predicated is (R. p. 2):

> "1. The defendant, Globe-Democrat Publishing Company, is a corporation duly organized and existing under the laws of the State of Missouri, and is at all times hereinafter mentioned doing business in the City of St. Louis, State of Missouri, publishing a daily newspaper in said City and State."

This was, and remains, an invocation of rights under Missouri's substantive law, not of rights under the federal statute; because no right to relief predicated upon § 301, (a), L. M. R. A., can exist unless the employees involved be in an industry affecting commerce. 29 U. S. C. 185 (a). This fact, if it be one, was never before the Missouri Courts, and despite its sly importation here, it is not before this Court.

The questions presented are thus a sham, on this record, for a fundamentally requisite fact for jurisdiction in this court (recognized as such by petitioners' very petition) *is simply not in the record*. The writ should be denied.

II.

We recognize the rule, that where petitioners for certiorari have invoked a federal right too late (or otherwise incorrectly) under State procedure, yet if the State court in fact decides this federal question thus imperfectly raised, this court may review the decision of the federal question.

The rule is not applicable here; because the court did not decide the federal question belatedly raised; and because of two most fundamental and supervening rules of law, one of jurisdiction, and one of justice, which will be discussed under Points III and IV.

The federal question raised by petitioners in their motion to rehear or transfer is stated in the following words (Pet'n. p. 26-a):

> "The holding in the case of Smith v. Evening News Association, 83 S. Ct. 267, decided December 10, 1962 (consequently not before respondent when this case was briefed and argued), requires this court to apply federal laws to collective bargaining contracts under the above statute. The holding of this division is contrary to the federal law."

Thus, the federal question raised was in two parts: (a) that the court must apply federal law; (b) that the law applied was contrary to the federal law.

Examination of the *per curiam* opinion shows that the court *assumed, but did not decide*, the first half of this question, and, as to the second half of the question held that no federal law to which it had been cited, or which it had found, demonstrated the alleged contrariety.

Thus:

(p. 13 a): "However, . . . we are required to apply certain federal substantive law, and we did not do so, and the result reached is contrary to such law, then plain error would have resulted."

(p. 15 a): "No federal case was then found." Since the preparation of the principal opinion "none has been found upon re-examination, and respondents certainly have cited no federal case which, in the words of Mr. Justice White, formulates and applies federal

law which would require or justify a result different from that which we reached in the principal opinion. *Assuming*, therefore, that in this suit we were required to apply federal substantive law, it is our conclusion that we did so, and that we did so correctly."

(p. 15a) "We do not agree, *assuming* that we are required to apply federal substantive law, that in doing so this court 'was sitting as a court of the United States' any more than it is sitting as a court of a sister state when it applies the law of that state."

The basic federal question raised here is the applicability, *vel non*, of federal substantive law as the criterion for decision. This question was not decided by the Supreme Court of Missouri; and there is nothing, therefore, to review here.

III

In any application here for review by certiorari, the decision for review as to the federal right claimed must have been a decision which controlled the result of the case. If there be in addition an adequate independent dispositive non-federal ground for the decision, it would do no good to review, and mayhap reverse, the decision of the federal question, since the judgment, on the other stated grounds, must go the same way, regardless of the outcome of the review of the federal question.

The principal involved is unanimous and unequivocal, and iterated in a line of Supreme Court opinions, the latest of which (as we read the reports) is Fay v. Noia, U. S. , 83 S. Ct. 822 (1963). In this opinion the rule is stated as follows (l. c. 843):

"It is a familiar principle that this court will decline to review state court judgments which rest on

independent and adequate state grounds, notwithstanding the co-presence of federal grounds [Citing authorities]. Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 86-87, denied this Court power to base the reversal of a state court decision on any error other than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) Constitution, treaties, statutes, commissions, or authorities in dispute * * *' Murdock (v. Memphis) was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, applied the principle directly to facts legally indistinguishable from those before us in this matter, viz.:

"Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

"This brings the situation clearly within the settled rule whereby this Court will not review a state court decision resting on an adequate and independent non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law (quoting authority)."

Here the Missouri Supreme Court did adhere to its first decision on local procedural grounds: that the alleged federal question was raised too late. The *per curiam* opinion concludes as follows (Pet'n. p. 16a):

"This case, as submitted to this court, did not involve a federal question. New matters not submitted in the original brief, but raised for the first time in a motion for rehearing after the opinion is handed down do not present any federal question requiring

a transfer to the court en banc. No Supreme Court rule requires a transfer of this case, and after careful consideration we conclude that no reason exists for this division to order a transfer. The alternative motion to transfer to the court en banc is denied.[8]

IV

Petitioners' application for the writ violates a fundamental principle of justice, and of law, that a reviewing court will not consider as error any ruling of a lower court induced by the party claiming the error.

The great text books state the rule as follows:

"An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling, or error, was made at his request or suggestion, or on his urging, or where he procured the making of the ruling, or the taking of the action." 5 C. J. S., Appeal and Error, § 1501.

"The rule is well settled that a party cannot successfully complain of error for which he is himself responsible, or of rulings which he has invited the trial court to make." 3 Am. Jur., Appeal and Error, § 276.

Petitioners' charge of error here is that the Missouri Supreme Court based its decision on principles of Missouri constitutional law. They elude it essentially for having done so. [illegible] Petition, p. 10, and they say in their petition for the writ, p. 21:

[illegible]

"From that line of cases represented by the **Lucas Flour**, **Lincoln Mills** and the **United Steelworkers Trilogy** cases, cases requiring the application of federal substantive law, it becomes apparent *this case cannot be decided in the strict, cramped, quarters of local contract law, third party beneficiary rules, or even the 'normal meaning of words.'*"

But, cramped or not, these were the very quarters delineated by petitioners from the filing of their petition through the rendition of the appellate opinion; it was petitioners themselves who invoked, throughout, local contract law as the source of their rights, and who urged that their claimed rights be vindicated under local contract law.

Petitioners concede that their first mention of the applicability of federal law came after the case had been decided on appeal. In their petition for the writ they say (Pet. 5):

"The first opportunity to do this was in petitioners' Motion for Rehearing, etc., and Suggestions. . . ."

(Incidentally, this statement is belied by petitioners' own statement, quoted next above, that the Lucas Flour, Lincoln Mills, and the United Steelworkers Trilogy cases—all of which preceded the argument of this case—are "cases requiring the application of federal substantive law".)

(a) We have shown (Point I, *supra*) that plaintiff's *nisi prius* petition *still* invokes local contract law. Missouri procedural law requires that while our courts will take judicial notice of state and federal statutes (490.080, Mo. R. S.), these laws must be invoked in the pleading if they are to be applied (490.110 Mo. R. S. 1959).

In Robinson v. Gaines, 331 S. W. 2d 653, 655, the Missouri Supreme Court had ruled (1960):

> "We now take judicial notice of the public statutes and judicial decisions of a sister state" [the Missouri statute includes "and other jurisdiction of the United States"] "when a pleading 'relies upon the law of another state or contains allegations which show that the law of another state must be applied.'"

In the absence of such a pleading the case is tried "under our general law": *ibid.*

Thus, the petition, not invoking extra-Missouri law, did invoke Missouri general law.

(b) Plaintiffs' theory of law is embodied in their offered instructions (R. 363, *et seq.*). None of these required the finding that the employment was in an industry affecting commerce, requisite to take the case out of general Missouri contract law, nor is there anything in their requests which indicates that they sought to invoke Federal law.

(c) It is clear that no invocation of law other than local contract law appeared in petitioners' brief on appeal. The *per curiam* opinion says:

> "We have examined plaintiffs' brief filed in this court, and we fail to find any reference to the above [federal law] contentions." (App., p. 13a.)

Under these circumstances, the rule invoked by plaintiffs themselves as Point VII c of their brief in the Missouri Supreme Court, a copy of which we have filed here, destroys their application for the writ of this court. These are the words that Petitioners there used, and which here they must eat:

> "A party cannot complain of errors invited by himself." Myers v. Buchanan, 333 S. W. (2d) 18."

CONCLUSION

It is respectfully submitted that on the rules of this court, and for lack of jurisdiction, and because of their estoppel, petitioners' application should be denied.

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